

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MATTHEW HARGRAVE,

Petitioner,

vs.

STATE OF NEVADA, et al.,

Respondents.

Case No. 2:13-cv-02021-JAD-CWH

ORDER

The court directed petitioner to show cause why this action should not be dismissed as untimely. Order (Doc. 5). The court then dismissed the action because petitioner had not filed anything in response to the court's order. Order (Doc. 8). Currently before the court are petitioner's motion for relief from order and judgment (Doc. 10) and respondents' response (Doc. 11).

The court first needs to address petitioner's contention that he tried to file a showing of cause in this action, but that the court returned it because of improper formatting. When the court returns a document, it enters a minute order to that effect, and the docket reflects that minute order. No such docket entry exists in this action. Attached to the motion (Doc. 10) is a minute order of the court returning a letter, but that was in another of petitioner's actions, *Hargrave v. Williams*, Case No. 2:13-cv-02228-GMN-PAL. This was not an error in docketing, because petitioner placed that case number on the documents, and the documents are in response to a motion to dismiss filed in that action. On the other hand, exhibit 1 to respondents' response (Doc. 11) contains a letter and a motion to show cause, both from petitioner and with the case number of the instant action. These

1 are the copies that petitioner served upon respondents. The date on the certificate of service, the
2 postmark on the envelope, and the stamp of receipt by respondents all show that petitioner mailed
3 his motion to show cause to respondents within the time allotted by the court's order to show cause.
4 For reasons unknown to the court, it did not receive the motion to show cause. For the purposes of
5 this order, the court assumes petitioner was not at fault. The court will grant petitioner's motion for
6 relief and vacate the judgment.

7 However, having reviewed the motion to show cause, the court is not persuaded, and the
8 court again will dismiss the action as untimely.

9 First, petitioner argues that the Nevada Supreme Court erred in ruling that his state habeas
10 corpus petition is untimely, and thus ineligible for tolling under 28 U.S.C. § 2244(d)(2). The
11 Nevada Supreme Court's decision is not subject to review by this court. "When a postconviction
12 petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)."
13 *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (quoting *Carey v. Saffold*, 536 U.S. 214, 226
14 (2002)). Furthermore, it makes no difference how the Nevada Supreme Court ruled on the
15 timeliness of the state habeas corpus petition. Petitioner's judgment of conviction became final on
16 April 26, 2010. The one-year period of limitation of 28 U.S.C. § 2244(d)(1) expired at the end of
17 April 26, 2011. Petitioner filed his state habeas corpus petition on October 29, 2012, a year and a
18 half after the federal period of limitation had expired. Even if his state habeas corpus petition was
19 timely under state law and thus eligible for tolling under § 2244(d)(2), there was no time left in the
20 federal period to be tolled. See *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

21 Second, petitioner also argues that the court should excuse a procedural default based upon
22 *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Response at 7-9 (#9). In *Martinez*, the Court held:

23 Where, under state law, claims of ineffective assistance of trial counsel must be raised in an
24 initial-review collateral proceeding, a procedural default will not bar a federal habeas court
25 from hearing a substantial claim of ineffective assistance at trial if, in the initial-review
collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

26 *Id.* at 1320 (emphasis added). The distinction between procedural default and untimeliness is
27 important. A claim is procedurally defaulted in federal court if the decision of the state court
28 regarding that claim rested on a state-law ground that is independent of the federal question and

adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). In petitioner's case, procedural default is not the issue. The court has not determined that it cannot reach the merits of petitioner's claims due to state-court applications of state law. Rather, the court has determined that the federal habeas corpus petition is untimely because of application of federal law, 28 U.S.C. § 2244(d). *Martinez* is inapplicable to petitioner's situation.

Third, petitioner argues that the state district court lacked jurisdiction to accept his guilty plea agreement. This is no excuse for the untimeliness of the petition. The language of the statute of limitation, 28 U.S.C. § 2244(d), contains no such exceptions for the question of jurisdiction, and no court has determined that such exceptions exist. *Cf. Barreto-Barreto v. United States*, 551 F.3d 95, 100 (1st Cir. 2008) (holding that no exception for jurisdictional challenges exists for equivalent period of limitations of motion attacking a federal sentence pursuant to 28 U.S.C. § 2255). Furthermore, petitioner was convicted of burglary and adjudicated as a habitual criminal. Burglary is a felony. Nev. Rev. Stat. § 205.060. The state district court has jurisdiction over felonies. In criminal cases, justice courts have jurisdiction over only misdemeanors. Nev. Rev. Stat. § 4.370(3). District courts have jurisdiction where justice courts do not have jurisdiction, including felonies. Nev. Const. Art. 6, § 6. Even if a challenge to a state court's jurisdiction is an exception to § 2244(d), the state district court had jurisdiction over petitioner's criminal case.


Reasonable jurists would not find the court's conclusions to be debatable or wrong, and the court will not issue a certificate of appealability.

IT IS THEREFORE ORDERED that petitioner's motion for relief from order and judgment (Doc. 10) is **GRANTED**. The judgment entered on August 5, 2014, is **VACATED**.

IT IS FURTHER ORDERED that this action is **DISMISSED** with prejudice as untimely. The clerk of the court shall enter judgment accordingly.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

Dated: October 8, 2014.


JENNIFER A. DORSEY
United States District Judge